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No. 88-2078

IN THE
SUPREME COURT OF THE UNITED STATES

Spring Term, 1989

JOHN G. BARROW, JR.

Plaintiff-Appellant-Petitioner

vs.

N. G. LUND, et al.

Defendant-Appellee-Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

JOHN MILLER
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(904)488-2381
Attorney for Respondent

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QUESTION PRESENTED

Whether the Circuit Court of Appeals properly affirmed the trial court's order dismissing Petitioner's complaint.

PARTIES TO THE PROCEEDINGS BELOW

For Petitioner: John G. Barrow, Jr.

For Respondents: N. G. Lund and
David Page, Jr., former
Public Health Physicians
employed by the Nassau County,
Florida, Public Health Unit

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BRIEF IN OPPOSITION

OPINION BELOW

The February 9, 1989, Judgment of the United States Court of Appeals For The Eleventh Circuit affirmed the April 5, 1988, Order of the United States District Court, Middle District of Florida, Jacksonville Division, dismissing Petitioner's Complaint. The Order of the trial court ruled that the Complaint was unclear, but if Petitioner was suing under 42 U.S.C. 1983, he failed to allege any deprivation of life, liberty or property by someone acting under color of law without due process as guaranteed by the Fourteenth Amendment. The trial court cited Economic Development Corp. of Dade County v. Steirheim, 782 F.2d 952 (11th Cir. 1986) as its authority to dismiss the complaint.

STATEMENT OF THE CASE

This matter has been filed by John G. Barrow, Jr., Pro Se, but not in forma pauperis.

The Complaint was filed on or about December 4, 1987 (Petitioner's Appendix b1 - b29). On January 4, 1988, Respondents filed a Motion To Dismiss, (Respondent's Appendix pages 4-12) alleging that the Complaint failed to state a cause of action pursuant to Rule 12(b), Rules of Civil Procedure; failed to properly allege a violation of civil rights; and failed to raise a federal question.

The matter was assigned to a U.S. Magistrate, who recommended that the Complaint be dismissed, without prejudice, as it failed to state a proper civil rights violation (Respondent's Appendix pages 1-3). On April 5, 1988,

the U.S. District Judge entered an Order dismissing the case based on the report and recommendation of the Magistrate (Petitioner's Appendix C-1).

The matter was then appealed to the United States Court of Appeals For The Eleventh Circuit, which affirmed on February 9, 1989, the trial court's Order, and clarified that the case was dismissed without prejudice (Petitioner's Appendix - second C-1 and C-3).

A. Background Facts

Petitioner's Complaint was very difficult to determine a clear understanding of just what he was alleging. It appears he had been denied a septic tank permit or a variance for a septic tank permit or he had been charged twice for a septic tank inspection, and alleged that a Florida Administrative Rule (Rule 10D-6) was an unlawful

delegation of Florida legislative authority and/or that said rule was ambiguous, unreasonable, capricious and/or arbitrary; it somehow was adverse to his interests; and/or the effect of the rule was damaging to his property.

ARGUMENT

Petitioner's Petition For Writ of Certiorari appears to question the legality of the Eleventh Circuit's decision affirming the trial court's Order dismissing the Complaint. Petitioner seems to question the trial court's authority to dismiss a complaint without scheduling a hearing or holding a jury trial. The majority of Petitioner's brief embraces a number of matters not connected with this case. It appears that Petitioner is a party in approximately twenty other causes of action and he has interwoven the issues of those other causes into this cause.

Petitioner is appearing herein Pro Se, but not in forma pauperis, as he clearly states in the last two pages of his petition that he has been refused representation from attorneys in six

states and has even had a $5,000 retainer returned from an attorney with a national reputation. Therefore, it appears a number of attorneys have already advised Petitioner of his meritless cause.

The Petition should first be denied for failure to comply with Rule 21.5, Supreme Court Rules, as it certainly lacks accuracy, brevity or clearness. Southern Power Co. v. North Carolina Public Service Co., 44 S.Ct. 164, 263 U.S. 508, 68 L.Ed. 413. Secondly, Petitioner has failed to cite any authority that supports his position. Lastly, the authority cited by the court in dismissing Petitioner's Complaint (Economic Development Corp. of Dade County, supra) is square on point with this Court's decision in Parratt v. Taylor, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908. In order to have a civil

rights actionable violation, Petitioner must allege, which he did not, that he was denied a right to any kind of a hearing to appeal the adverse action taken against him by a state official.

The State of Florida has provided a comprehensive remedial scheme under Chapter 120, Florida Statutes, to grant anyone who wishes to challenge any rule or policy a hearing under section 120.56(1), Florida Statutes, (Respondent's Appendix page 13). Petitioner had a right to a Chapter 120, Florida Statutes, hearing, but made no attempt to pursue one. Therefore, as required in the summary of Parratt, supra, the state would have provided Petitioner a hearing if he had alleged he had suffered a loss at the state's hands; and even though he may not have been fully compensated, the hearing would have

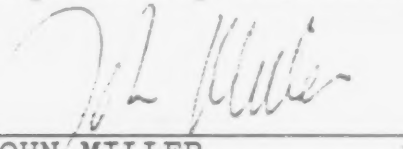
been sufficient to satisfy the requirements of due process. Because Petitioner failed to seek a state administrative hearing or appeal for the alleged adverse action taken against him by state employees (Respondents), Petitioner has suffered no deprivation of his constitutional rights and it was proper and legal for the trial court to have dismissed his Complaint without prejudice.

Petitioner's contention that he is entitled to a hearing or a jury trial is misplaced as this court has held that it is legally proper for a trial court to dismiss a complaint under Rule 12(b), Rules of Civil Procedure, for failure to state a cause of action. Williamson v. Tucker, 645 F.2d 404 (5th Cir. 1981) certiorari denied 102 S.Ct. 396, 454 U.S. 897, 70 L.Ed.2d 212.

CONCLUSION

The Judgment of the Court of Appeals of the Eleventh Circuit should be affirmed and the Petition For Writ Of Certiorari denied.

Respectfully submitted,



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July 12, 1989

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief in Opposition was served this 17 day of July, 1989, in accordance with rule 28.1 of the Rules of the Supreme Court of the United States by depositing three true copies in a United States Post Office or mailbox, with first-class postage prepaid addressed to:

John G. Barrow, Jr.
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JOHN MILLER